IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.156 OF 1989

Vithal Hari Patil .. Appellant

Versus

Pandharinath Bhau Vartak .. Respondent

Shri K.K.Malpathak for appellant

CORAM : P.V.KAKADE, J.

DATE : 25TH OCTOBER, 2004

P.C.:

1. Heard the learned counsel for the appellant. None present for the respondent.

2. The appellant preferred this appeal against the judgment and order dated 17th December, 1988 passed by Addl. District Judge, Thane whereby the appeal was partly allowed and Trial Court’s Judgment dismissing the claim for possession of the plaintiff was set aside. It

was also directed by the Lower Appellate Court that respondent-defenadnts to deliver possession of piece of land admeasuring 0-5 R which is a suit property.

3. The Respondents-plaintiffs filed suit for perpetual injunction and possession of the encroached portion together with the costs of the suit. The suit land described in Plaint para 1-A and 1-B was said to be originally belonged to one Bhau Vasudev Vartak. Plaintiffs are his sons. They are in possession of the suit property. The land described in plaint Para B was owned by the defendants as they were in possession thereof. But the defendants allegedly dug a ditch at the western boundary of their land at the eastern side of the land of the plaintiffs admeasuring 10’ x 10 x 3’ encroachment was made. Hence notice was issued to the defendants calling upon them to filling the ditch and keep the land as it is. Defendants replied to challenging its contents and hence the suit came to be filed. Originally the suit was only for perpetual injunction but it was amended on the ground that pending the suit defendant no.2 purchased the part of the suit property from defendant no.1 and made encroachment and hence the suit finally was settled for perpetual

injunction and possession of the suit property. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs suit deserves to be dismissed as encroachment was not proved. Appeal was carried to the District Court Thane. The learned Addl. District Judge partly allowed the appeal holding that the encroachment by defendants to the suit was proved and as such the decree for possession to that effect came to be passed. Hence the second appeal is filed.

4. At the time of admission of the present appeal the substantial question of law was settled to the effect that whether the learned Judge erred in holding that failure on the part of the DILR to give notice to Defendant no.2 at the time of survey could be properly explained?

5. At the outset it may be noted that it is an admitted position that defendant no.2 was not given notice by the DILR, acted as Court Commissioner, in order to ascertain there was encroachment upon the property or not. The learned Appellate Court Judge has observed to the effect that necessary notice was given by DILR to

defendant-respondent no.1 i.e. original owner and it was not established that in fact defendant no.2 was sold any part of the suit property pending the suit by defendant no.1 because there was no documentary evidence on record to show such as sale deed to show that transfer of property had lawfully taken place between the parties as alleged. In view of this situation the learned Appellate Court has came to the conclusion that as there was no documentary evidence or entry in the record of rights of the name of respondent no.2 for the land bearing survey No.128, there was no reason to hold that defendant no.2 was required to be given notice under any rules or law.

6. In my considered view, this question cannot assume the substantial question of law at all, as it was a question of fact and that was properly appreciated and decided by the Lower Appellate Court Judge and therefore, it would brook no interference.

7. The learned counsel for the appellant further urged that the Lower Appellate Court had not properly gone through the evidence on record and therefore, he wanted to rely on the observations made by the trial court in

its judgment. However, the legal position on this aspect is very clear. Moreover, the only issue raised at this stage is in respect of non issuance of notice to defendant no.2 at the time of Court Commissioner survey pending the suit, which is seem to be properly adjudicated by the Lower Appellate Court.

8. In the result there is no substance in the second appeal and as such stands dismissed with no order as to costs.